IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No.————

THE STATE OF NEW YORK,

Petitioner,

against

JOSEPH CARDINAL, doing business under the name and style of CARDINAL ENGINEERING COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of Matters Involved

The suit was brought by claimant on a policy of insurance issued by the State Insurance Fund. The Court of Appeals has held that the policy covered among others the following obligations:

> "* * * to indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such employees wherever such injuries may be sustained including the liability imposed upon this employer by reason of a suit or claim brought against him by another to recover

the amount of damages obtained from such other by an employee of the employer for injuries sustained by such employee arising out of and in the course of his employment" (R. 161).

* * * * * *

"THE STATE INSURANCE FUND WILL DEFEND in the name of and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent, * * *" (R. 151).

Substantially the Court of Appeals held as follows:

1. The suit is on an insurance policy issued by the State Insurance Fund (R. 151).
2. The policy contained an agreement by the Fund to defend in the name of the insured any action brought against him by his employees or by a third party seeking to impose liability on the employer for the amount of damages obtained from such other (R. 151).
3. Libels were filed by Cardinal's employees against the United States claiming damages for such injuries and the United States filed petitions impleading Cardinal (R. 152, 153).
4. The petitions required Cardinal to answer the allegations of the libels as well as the petitions (R. 153).
5. The State Insurance Fund breached its contract by unjustifiabily refusing to defend the actions (R. 154, 156).

6. Cardinal, thus forced to defend himself, acted reasonably in settling the actions for the sum of $87,000. and reasonably expended $14,000. to counsel for the defense of the actions (R. 156, 157, 165).

Objections to Jurisdiction

(a) This Court is without jurisdiction to review a "decision" of the Court of Appeals of the State of New York.

The document filed by petitioner is entitled: "PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION OF THE HIGHEST COURT OF NEW YORK STATE." It "prays for a writ of certiorari to review a decision of the Court of Appeals of the State of New York, being the court of last resort of that State." It further states: "The decision is officially reported as Cardinal v. State, 304 N. Y. 400."

It specifically bases its claim to jurisdiction on 28 U. S. C., Section 1257, subd. #3. Section 1257 reads in part:

> "Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:"

While under Title 28 U. S. C., Secs. 1254 and 1255, "cases" in the United States Court of Appeals or Court of Claims may be reviewed, even on certified questions, only final judgments or decrees of state courts may be reviewed.

The deliberate use of the word "decision" by petitioner rather than the "judgment" or "remittitur" of the Court of Appeals, which was entered on the same date as the decision, that is, July 15, 1952 is a patent attempt to confuse the issue on the question of the timeliness of the petition which will be discussed immediately below. If the petitioner concedes that the "judgment" which it seeks

to review was entered on July 15, 1952, the petition obviously was not timely filed. If on the other hand it seeks to review as the "judgment" of the Court of Appeals, the judgment entered in the Court of Claims on December 22, 1952, upon the directions of the Court of Appeals it must face a number of decisions of this Court, which will be later discussed, holding that such judgment entered in the lower Court is not reviewable by this Court.

(b) The petition was not filed within the time prescribed by statute.

Petitioner states that the time within which the application must be made is governed by Title 28 U. S. C., Sec. 2101, subd. (c). That subsection reads as follows:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

The petition herein was filed on February 11, 1953.

There are four dates which petitioner raises as being pertinent.

On July 15, 1952 the decision of the Court of Appeals was handed down and the remittitur or judgment of the Court of Appeals was entered (R. 172). Ninety days would expire on October 13, 1952. The State's motion for reargument was denied on October 9, 1952 (R. 173). Ninety days from that date would expire on January 7, 1953. Obviously if either of these two dates is the proper date the time for filing the petition has not only expired

but it had expired on January 19, 1953 when Mr. Justice Jackson signed an order extending the time to March 9th, 1953 "provided the time had not already expired" (R. 178). It is equally obvious that if the time had expired on January 7, 1952, Mr. Justice Jackson could not extend the time to March 9, 1953, which would be more than the sixty days allowed by Sec. 2101, Title 28, subd. (c).

The next date suggested is December 5, 1952, the date when Cardinal's motion for an amendment of the remittitur was denied (R. 173).

A motion to amend the remittitur does not toll the statute.

Department of Banking v. *Pink*, 317 U. S. 264.

The petitioner strongly urges that December 22, 1952, the date when the judgment was entered in the Court of Claims is the date from which the ninety days is to be figured (R. 176). It recognizes the fact that in *Dept. of Banking* v. *Pink*, 317 U. S. 264, and *Cole* v. *Violette*, 319 U. S. 581, this Court has definitely ruled that the time starts to run from the time of the rendition of the judgment of the Court of Appeals. Petitioner's counsel tries to distinguish those two cases by suggestion that a different rule should apply when the Court of Appeals affirms an already existing judgment than when the Court of Appeals directs a judgment for the first time.

This distinction is untenable. In *Dept. of Banking* v. *Pink* (*supra*), 317 U. S. 264, 267, this Court said in part:

> "See especially Chief Justice White's opinion in Mower v. Fletcher, 114 U. S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had

> directed. See also Wurts v. Hoagland, 105 U. S. 701, 702, and Clark v. Williard, 292 U. S. 112, 117, 118. This rule applies with equal force to cases from New York, in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here."

In *Mower* v. *Fletcher,* 114 U. S. 127, the Appellate Court of the State of California had rendered a judgment directing that the judgment of the state district court

> "be, and the same is hereby, reversed, with costs, with directions to the superior court of Los Angeles county to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

In the instant case the remittitur directed that

> "the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified in accordance with the opinion herein, judgment of the Court of Claims reversed, and the case remitted to the Court of Claims for entry of judgment in favor of the claimant as demanded in the claim, with costs in all courts" (p. 172).

If, in fact, the remittitur of the Court of Appeals did not fully determine all of the rights of the parties in this matter, then this petition must in any event be denied because the judgment entered in the Court of Claims was not a judgment of the Court of Appeals and therefore was not a judgment "rendered by the highest court of a State in which a decision could be had", as required by Title 28, Sec. 1257. *Bruce et al.* v. *Tobin,* 245 U. S. 18.

If the judgment of the Court of Appeals did not finally determine all of the rights of the parties the State would be compelled first to appeal the judgment of the Court of Claims to the Appellate Division of the Supreme Court and from there back again to the Court of Appeals before application could be made to this court for review. In either event therefore, this petition must be denied because the only judgment of the highest court of the state in existence today is the judgment entered July 15, 1952.

(c) No Federal statutes are involved in this litigation.

Petitioner claims that Title 28 U. S. C. Sec. 1257, subd. 3, justifies the granting of a writ of certiorari in this case based upon the following language:

> "* * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It then asserts in general language that a right or immunity claimed under Sec. 905 of the Longshoremen's and Harbor Workers' Compensation Act. (33 U. S. C., Sec. 905) was denied to it. But specifically it does not contend that that section granted any rights to the petitioner; on the contrary, its contention as to the application of that section is in substance given in the following quotation from the petition, page 4:

> "In the present suit the State has at various times relied on other defenses, but constantly it has relied on the immunity under 33 U. S. C. Sec. 905, to the effect that Cardinal's liability under the Act was 'exclusive' of any liability to third parties for Cardinal's negligence to his employees."

In other words, it contends that Cardinal had rights under that section which he did not fully assert and defend in the actions brought against him.

That section certainly has no application to the rights between an insurer and insured under a policy of insurance, especially when the insurer in violation of the duties assumed by its contract unjustifiably refuses to defend actions brought against its insured. This is made patent by the following quotation from the opinion of the Court of Appeals:

> "We come now to the State's argument based on *Halcyon* v. *Haenn, supra,* decided by the nation's highest court after the present suit had been passed on by the Appellate Division. Of course, *Halcyon* v. *Haenn* would be the present law of a hypothetical case which would be up for decision now, had the United States paid the whole settlement, and were it now suing Cardinal for contribution. But there is no such suit, and no such situation. Our problem is as to the rights, between themselves, of Cardinal and the State Insurance Fund, as of 1946 and 1947, when the Fund breached its obligation to defend Cardinal, and waived all questions except as to the $25,000 alleged limit. The Fund, had it so chosen, could have taken on the defense of the impleading petitions, with such reservations of rights as against Cardinal, as it thought appropriate. The Fund, we suppose, could have defended against the tort count in the impleading petitions, and required Cardinal to defend himself as to any contract claim by the United States, if the Fund thought that there was any difference between the 'tort' liability and the 'contract' obligation. It did none of these things. It waived all claims of noncoverage except one now shown to be invalid, and, while conceding the fairness of the settlements, refused to defend, or to join in the settlements. By so doing, it, as matter of law, breached its insurance contract and, on the concessions here, the damages for that breach could be in no sum other than the total of the settlement amount plus the lawyer's fees paid by Cardinal" (R. 163).

(d) The only "questions presented" by the petition do not in fact exist.

The petition (p. 9) states the "questions presented" as follows:

> "1. Was the decision of the Court of Appeals, holdthat Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees in a maritime accident which was not a collision, consistent with the decision of this Court in Halcyon Lines v. Haenn Ship. Corp., 342 U. S. 282, and any other applicable decision?
>
> 2. Did such decision of the Court of Appeals deprive the State of a right or immunity which it claimed under the Constitution or any statute of the United States, and particularly under 33 U. S. C. Sec. 905?

Both of these questions are founded upon the assertion that the Court of Appeals held "that Cardinal was liable to the United States otherwise than by their contract, for injuries sustained by Cardinal's employees * * *."

This fundamental assertion, embodied in both questions and without which there are no questions, is untrue.

Rules 38, 26 and 27 of this Court make it very plain that any assertion of error by the State Court should be supported by reference to the portion of the record which supports the assertion. The majority opinion of the Court of Appeals consisted of seventeen pages. No place in that opinion will the assertion of petitioner be supported; on the contrary, the entire opinion negatives that assertion.

The judgment is based entirely upon an interpretation of the statutory policy of insurance issued by the State Insurance Fund.

The opinion is summarized by the Court of Appeals as follows:

> "Summing up, we think that the breach by the Fund, of its policy contract, and the reasonableness of the subsequent settlement made by Cardinal, were established beyond any dispute, and accordingly, that there was no defense to this suit and that there is now no necessity for a new trial" (R. 165).

Petitioner adopts as its entire brief and argument a quotation from the dissenting opinion of Judge Fuld quoted at pages 9 and 10 of the petition. That quotation starts as follows:

> "The dispute turns on whether, under the circumstances of this case, Cardinal as impleaded defendant was under an obligation 'imposed by law' to contribute to his joint tort-feasor: * * *."

The majority opinion said in part:

> "The argument from the *Halcyon* case (*supra*), is that, since Cardinal and the United States have, in the present suit, by findings of fact, been held to be joint feasors, thus, it is said, there never was any right in the United States to exact contribution from its joint tort feasor Cardinal. Of course, that is all 'after the event' material, since when the settlements were made, there not only was no *Halcyon* case, but there was no finding, and no certainty that there ever would be a finding, that the United States and Cardinal were joint tort feasors" (R. 163-164).
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> * * * * * *
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> "Had the Fund wished to claim that, under the *Halcyon* or some similar theory, no tort liability ran against Cardinal, it should have undertaken the defense for that purpose" (R. 164).
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> * * * * * *

> "On the clear showing of an unlawful refusal by this insurer to defend, the sole question is as to the reasonableness of the settlement thereafter made by the insured. That question must be answered *nunc pro tunc,* not by a long later trial, under newly handed down decisions, as to who could be held for damages, and on what theory, for the injuries to Cardinal's workmen" (R. 165).

It is thus patent that the Court of Appeals assumed petitioner's contention as to the holding of this Court in *Halcyon Lines* v. *Haenn Ship. Corp.,* 342 U. S. 282, was correct and made no finding contrary to that interpretation. On the contrary it held that, assuming the State's interpretation of that case to be correct, the state law required the imposition of liability because there had been an unlawful breach of its policy by the State Insurance Fund, and Cardinal acted reasonably in settling the claims against him amounting to $555,000 by the payment of $87,000 (R. 158, 165).

It is thus patent that the judgment of the Court of Appeals was based purely on state law and no decisions of Federal questions were involved. In such circumstances this Court has repeatedly held that it will not review judgments of State Courts resting on adequate state grounds.

> *Williams* v. *Kaiser,* 323 U. S. 471, 477;
> *Honeyman* v. *Hanan,* 300 U. S. 14, 18;
> *Lynch* v. *New York,* 293 U. S. 52.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be denied.

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